

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

JILLINA A. MANION,	)	
	)	
Plaintiff,	)	
	)	No. CV-06-739-HU
v.	)	
	)	
THE UNITED STATES,	)	OPINION & ORDER
	)	
Defendant.	)	
_____	)	

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HUBEL, Magistrate Judge:

Plaintiff Jillina Manion brings this Federal Tort Claims Act  
action against the United States for damage done to her property.

1 - OPINION & ORDER

1 Defendant moves to dismiss based on the statute of ultimate repose.  
2 Both parties have consented to entry of final judgment by a  
3 Magistrate Judge in accordance with Federal Rule of Civil Procedure  
4 73 and 28 U.S.C. § 636(c). I grant the motion.

5 BACKGROUND

6 Plaintiff owns a residence and real property of 0.27 acres in  
7 Astoria. Am. Compl. at ¶ 1. The United States Coast Guard is an  
8 owner of 43 acres located next to the east line of plaintiff's  
9 property. Id. at ¶ 2.

10 Plaintiff's residence was built in 1969. Id. at ¶ 5.  
11 Plaintiff acquired it in 1990. Id. Plaintiff's property is  
12 adjoined on the east by the steep westerly slope of a ravine that  
13 runs generally parallel with the east line of plaintiff's property  
14 and a small stream running at the bottom of the ravine,  
15 approximately fifty feet below the level of plaintiff's adjacent  
16 property. Id.

17 Before 1993, the ravine and stream were in their natural state  
18 and the westerly slope of the ravine furnished lateral support to  
19 plaintiff's adjacent property. Id. at ¶ 6. Also, up to that time,  
20 Alameda Avenue, which runs on the north, front line of plaintiff's  
21 property, terminated at the northeasterly corner of plaintiff's  
22 property and near the top of the westerly slope of the ravine. Id.

23 In 1993-1994, the Coast Guard constructed a large housing  
24 development consisting of over one hundred residential units, on  
25 the property adjacent to plaintiff's property. Id. at ¶¶ 2, 7. In  
26 the course of that construction work, defendant caused Alameda  
27 Avenue to be extended from its former terminus at the northeastern  
28 corner of plaintiff's property to cross the ravine and continue

1 into defendant's property by placing a culvert approximately forty-  
2 eight inches in diameter at the bottom of the ravine and filling  
3 the ravine to street level. Id. at ¶ 7.

4 The Coast Guard further caused excavation work to be done at  
5 the bottom of the ravine and in the slopes of the ravine adjacent  
6 to plaintiff's property in order to divert into the culvert and  
7 stream a large quantity of water draining downhill on defendant's  
8 property from the housing unit areas that had formerly not drained  
9 into the ravine. Id.

10 Plaintiff alleges that the construction removed the lateral  
11 support of her property furnished by the westerly slope of the  
12 ravine on defendant's property adjacent to the easterly line of  
13 plaintiff's property, causing plaintiff's residence to subside and  
14 its foundation, walls, and ceilings to crack and break up. Id. at  
15 ¶ 8. Plaintiff contends that the extent of the subsidence  
16 continues to increase as time passes, and will make plaintiff's  
17 residence uninhabitable in the near future until the subsidence is  
18 halted by reconstruction of plaintiff's residence or other means.  
19 Id.

20 Plaintiff contends that defendant's removal of the lateral  
21 support of plaintiff's property was negligent in that defendant was  
22 warned by its soils engineers that soils in the ravine and slopes  
23 were unstable, and that excavation and other work in the ravine  
24 would cause slippage and subsidence of those soils and of soils on  
25 nearby property, including plaintiff's property, unless certain  
26 measures were taken in excavating and altering the ravine and  
27 stream to avoid those results. Id. at ¶ 9. Plaintiff contends  
28 that defendant failed to cause those measures to be performed or to

1 be performed properly, and failed to inspect the excavation and  
2 other alterations of the ravine and stream to see that the  
3 recommended measures were performed or were performed properly.  
4 Id. at ¶ 10.

5 Plaintiff further contends that since the alleged negligent  
6 conduct described above, defendant has continued to be negligent in  
7 failing to inspect and maintain the ravine area on its property  
8 adjacent to plaintiff's property in such a manner as to prevent its  
9 slippage and subsidence and reduction of lateral support to  
10 plaintiff's property. Id.

11 Plaintiff contends that she did not discover the subsidence  
12 damages to her property and that defendant's conduct caused it,  
13 until 2004, less than two years before filing the case. Id. at ¶  
14 12. Plaintiff alleges that she has been damaged in the amount of  
15 \$240,400 for the alleged negligent conduct. Id. at ¶ 11.

#### 16 STANDARDS

17 On a motion to dismiss, the court must review the sufficiency  
18 of the complaint. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).  
19 The court should construe the complaint most favorably to the  
20 pleader:

21 In appraising the sufficiency of the complaint, we  
22 follow, of course, the accepted rule that the complaint  
23 should not be dismissed for failure to state a claim  
24 unless it appears beyond doubt that the plaintiff can  
25 prove no set of facts in support of his claim which would  
26 entitle him to relief.

27 Conley v. Gibson, 355 U.S. 41, 45-46 (1957); American Family Ass'n,  
28 Inc. v. City & County of San Francisco, 277 F.3d 1114, 1120 (9th  
Cir. 2002). The allegations of material fact must be taken as  
true. Moyo v. Gomez, 40 F.3d 982, 984 (9th Cir. 1994).

## DISCUSSION

Under the Federal Tort Claims Act (FTCA), a claim may be asserted against the United States for money damages for injury to or loss of property caused by the negligent or wrongful act of any employee of the federal government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C. § 1346(b)(1); see also United States v. Orleans, 425 U.S. 807, 813 (1976) (the federal government is liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment); 28 U.S.C. § 2674 (the United States is liable "in the same manner and to the same extent as a private individual under like circumstances").

As explained by the Supreme Court, "[a]s this provision [28 U.S.C. § 2674] makes clear, in conjunction with the jurisdictional grant over FTCA cases in 28 U.S.C. § 1346(b), the extent of the United States' liability is generally determined by reference to state law." Molzof v. United States, 502 U.S. 301, 305 (1992).

Under Oregon Revised Statute § (O.R.S.) 12.115,

(1) In no event shall any action for negligent injury to person or property of another be commenced more than 10 years from the date of the act or omission complained of.

(2) Nothing in this section shall be construed to extend any period of limitation otherwise established by law, including but not limited to the limitations established by ORS 12.110.

O.R.S. 12.115.

Additionally, O.R.S. 12.135 provides that

(1) An action against a person, whether in contract, tort or otherwise, arising from such person having performed

1 the construction, alteration or repair of any improvement  
2 to real property or the supervision or inspection  
3 thereof, or from such person having furnished the design,  
4 planning, surveying, architectural or engineering  
5 services for such improvement, shall be commenced within  
6 the applicable period of limitation otherwise established  
7 by law; but in any event such action shall be commenced  
8 within 10 years from substantial completion or  
9 abandonment of such construction, alteration or repair of  
10 the improvement to real property.

11 \* \* \*

12 (3) For purposes of this section, "substantial  
13 completion" means the date when the contractee accepts in  
14 writing the construction, alteration or repair of the  
15 improvement to real property or any designated portion  
16 thereof as having reached that state of completion when  
17 it may be used or occupied for its intended purpose or,  
18 if there is no such written acceptance, the date of  
19 acceptance of the completed construction, alteration or  
20 repair of such improvement by the contractee.

21 O.R.S. 12.135.

22 Defendant argues that plaintiff's claim is barred by O.R.S.  
23 12.115 and/or 12.135.<sup>1</sup> Defendant notes that the Amended Complaint  
24 alleges that construction was completed in 1994 and the  
25 administrative tort claim alleges that it was completed in 1993.  
26 The administrative tort claim was not filed until April 7, 2005,  
27 and the Complaint was not filed until May 22, 2006. Neither the  
28 administrative tort claim nor the Complaint were filed within 10  
years of the alleged negligent act or the completion of the  
construction project.

Plaintiff contends that the statute of repose does not apply

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<sup>1</sup> In the motion to dismiss, defendant moves to dismiss  
based on these statutes, but alternatively moves to limit  
plaintiff's claim to the amount of damages specified in her  
administrative claim. After the motion was filed, plaintiff  
filed an amended complaint. In its reply brief, defendant states  
that it will not pursue the alternative motion at this time, but  
will wait, if the claim survives the motion to dismiss, for  
discovery before raising that argument.

1 because she had an active, continuous relationship with defendant,  
2 and alternatively, that a continuing duty by defendant to inspect  
3 and maintain the ravine area on its property to ensure adequate  
4 lateral support is enough to sustain her claim. She also argues,  
5 based on a Kansas case, that her action did not accrue until her  
6 land subsided.

7 I reject plaintiff's active, continuous relationship argument.  
8 In Josephs v. Burns, 260 Or. 493, 491 P.2d 203 (1971), overruled in  
9 part on other grounds, Smothers v. Gresham Transfer, Inc., 332 Or.  
10 83, 23 P.3d 333 (2001), the Oregon Supreme Court addressed the  
11 statute of ultimate repose in O.R.S. 12.115(1) in a construction  
12 case involving a collapsed roof. The court first rejected the  
13 plaintiffs' argument that the ten-year limitation did not begin to  
14 run until the roof collapsed. Id. at 496, 491 P.2d at 204. The  
15 court stated that the statute was intended "to provide an overall  
16 maximum upper limit on the time within which a tort action could be  
17 brought, regardless of the date of discovery or of any other  
18 circumstances." Id. at 498, 491 P.2d at 205. The court also noted  
19 that "the inability of the damaged party to bring an action was not  
20 intended to prevent the running of the statutory period." Id. at  
21 496, 491 P.2d at 204.

22 Based on this holding from Josephs, it is clear that O.R.S.  
23 12.115(1) bars plaintiff's allegations of negligent design and  
24 construction of the Coast Guard housing facility and the area  
25 adjacent to plaintiff's property. See Little v. Wimmer, 303 Or.  
26 580, 583, 739 P.2d 564, 565-66 (1987) (holding that the trial court  
27 correctly held that O.R.S. 12.115(1) and 12.135 barred the  
28 plaintiffs' action for defects existing as a result of the design

1 or at the time of the original construction, as the subject  
2 intersection was designed and constructed more than 10 years before  
3 plaintiffs' cause of action).

4 The Josephs court then addressed the plaintiffs' argument that  
5 the defendants had a continuing duty to warn them of the hazards of  
6 an improperly constructed roof. The court responded that

7 [i]f the statute was intended to be one of ultimate  
8 repose, regardless of circumstances, it would follow that  
9 the legislature did not intend the statute to be  
10 circumvented by allegations that subsequent to the  
11 fundamental wrong, a continuing duty existed to rectify  
12 the results of such wrong. By this statement we do not  
intend to prejudge a situation in which an active,  
continuous relationship between plaintiff and defendant  
exists from the time of the negligent acts to a time  
within the period during which an action is permitted.

13 Id. at 501-02, 491 P.2d at 207.

14 A 1977 case further explained the "active, continuous  
15 relationship" exception noted in Josephs. In Cavan v. General  
16 Motors, 280 Or. 455, 571 P.2d 1249 (1977), the court rejected the  
17 argument that the provision by a manufacturer of a part, post-sale,  
18 was sufficient to show a continuing relationship as envisioned in  
19 Josephs. The court explained its earlier holding in Josephs:

20 In Josephs we withheld consideration of situations in  
21 which the plaintiff is in a relationship of trust and  
22 confidence with the defendant and in which continued  
23 treatment or other ongoing resort to the skills of the  
24 defendant is required. The classic example is the  
25 doctor-patient relationship. . . . In cases such as  
this the potential plaintiff may be in no position of  
independence to recognize fairly the existence of a cause  
of action until the relationship is terminated. Such a  
situation may call for a different application of the  
policies behind a statute of limitations or statute of  
ultimate repose.

26 Id., 280 Or. at 458, 571 P.2d at 1250 (citation omitted).

27 A more recent Oregon Court of Appeals case, Rutter v. Neuman,  
28 188 Or. App. 128, 71 P.3d 76 (2003), one with facts more analogous



1 to the instant matter, rejected an argument made by the plaintiffs  
2 based on the Josephs "active, continuous relationship" exception to  
3 the statute. There, the plaintiffs alleged negligence by the City  
4 of Ashland, arising out of a landslide that damaged their property.  
5 The City argued that the action was time barred under either O.R.S.  
6 12.115(1) or 12.135(1). The plaintiffs argued that neither of  
7 those statutes applied because their action was not based on the  
8 failure of the city to abate the condition in 1984, but rather on  
9 the continuing failure to take action from 1984 through the filing  
10 of the complaint in 1997.

11 Relying on Josephs and other cases, the plaintiffs argued that  
12 they had an "active, continuous relationship" with the city by  
13 virtue of what the plaintiffs described as a continuing obligation  
14 to remedy public nuisances as provided in the municipal code. The  
15 court discussed earlier cases, including Cavan, in regard to the  
16 "active, continuous relationship" issue and rejected the  
17 plaintiffs' argument. Id. at 136-37, 71 P.3d at 80. The court  
18 noted that there was no evidence of any relationship between the  
19 plaintiffs and the city after 1984, when the plaintiffs moved out  
20 of the house and decided not to sue. Id. It explained that  
21 "[p]laintiffs have cited no evidence of any conversations,  
22 correspondence, or other communications between them and the city  
23 from 1984 to 1997. Certainly nothing in the record demonstrates  
24 the existence of the sort of 'relationship of trust and confidence  
25 with the defendant' that the court said was necessary in Cavan."  
26 Id.

27 Here, defendant notes that plaintiff has not alleged an  
28 active, continuous relationship between the parties. Nothing in

1 the Amended Complaint demonstrates the existence of a relationship  
2 of trust or confidence with the government that would constitute an  
3 active, continuous relationship between the parties. As in Rutter,  
4 there is no evidence of any "conversations, correspondence, or  
5 other communications" between the plaintiff and the Coast Guard.  
6 Moreover, the cases do not support finding the presence of an  
7 active, continuous relationship as articulated in Josephs based  
8 only on the status of adjoining landowners. Without any additional  
9 allegations, plaintiff cannot sustain a continuing negligence claim  
10 on the basis of an active, continuous relationship with defendant.

11 Plaintiff next relies on Little to argue that her allegations  
12 of post-construction negligence in paragraph 10 of the Amended  
13 Complaint are distinguishable and not subject to the limitations in  
14 the statutes of ultimate repose. In Little, the court, as noted  
15 above, affirmed the trial court's conclusion that any claims based  
16 on the original design and construction of an allegedly dangerous  
17 intersection, were barred by the statute of ultimate repose.

18 The court then distinguished the plaintiffs' "independent  
19 premise" that the defendants were negligent in failing to remedy a  
20 dangerous condition of the highway and in failing to warn motorists  
21 of the existing dangerous condition of the highway. Little, 303  
22 Or. at 585, 739 P.2d at 567. Such allegations were not subject to  
23 the statute of ultimate repose when they were separate and apart  
24 from any alleged negligence at the time of design and construction  
25 or any failure to correct such original negligence. Id.

26 The court noted that there was no dispute that the state was  
27 responsible for maintaining the intersection. Id. The state was  
28 charged by statute with the continuous supervision and control of

1 maintenance and improvement of the state's highways. Id. at 585,  
2 739 P.2d at 567. The state conceded as much. Id. The court  
3 further noted that the evidence that a number of accidents had  
4 occurred at or near the intersection created factual questions  
5 about the foreseeability of risk and the appropriateness of the  
6 defendant's conduct in failing to remedy the situation or in  
7 failing to warn motorists of the potential danger of that part of  
8 the highway. Id. at 586, 739 P.2d at 567. These were issues  
9 appropriately reserved for the jury.

10 Relying on Little, plaintiff here argues that she has a viable  
11 allegation of continuing negligence by defendant, for failing to  
12 inspect and maintain the ravine area on the Coast Guard's property  
13 adjacent to her property in such a manner as to prevent its  
14 slippage and subsidence and reduction of lateral support to her  
15 property. She contends that this allegedly negligent conduct  
16 continues to the present day.

17 She argues that just as the Oregon Supreme Court ruled that  
18 the allegations of plaintiff in Little relating to an ongoing  
19 failure to remedy and a failure to warn prevented summary judgment  
20 to the defendant on a statute of ultimate repose theory,  
21 defendant's motion to dismiss in the instant case should be denied  
22 in light of defendant's continuing duty to provide lateral support.

23 Defendant responds that plaintiff's allegations of post-  
24 construction and design negligence do not identify a statute, rule,  
25 or duty that requires independent, contemporaneous maintenance or  
26 inspection. Without such a requirement, defendant argues, the  
27 continuing negligence allegations in paragraph 10 of the Amended  
28 Complaint should be barred.

1 I agree with defendant. The allegations in paragraph 10  
2 expressly address defendant's alleged failure to inspect and  
3 maintain the ravine area. Am. Compl. at ¶ 10. Unlike in Little,  
4 defendant does not concede any duty to provide ongoing inspection  
5 and maintenance. Unlike in Little, there is no identified source  
6 of such a duty.

7 In her memorandum in opposition to the motion to dismiss,  
8 plaintiff refers to defendant's duty, as an adjoining landowner, to  
9 provide lateral support to plaintiff's property. Although  
10 plaintiff cites no Oregon cases discussing such a duty, I assume  
11 for the purposes of this Opinion, that Oregon recognizes one. See  
12 State ex rel. Dep't of Transp. v. Winters, 170 Or. App. 118, 128,  
13 10 P.3d 961, 968 (2000) (right of lateral support is a right of  
14 property annexed to land). Nonetheless, this "duty" by defendant  
15 to provide lateral support in support of plaintiff's continuing  
16 negligence allegations does not bar the application of the statute  
17 of ultimate repose because any such duty by defendant was breached  
18 at the time of the construction of the Coast Guard housing units.  
19 That is, the lateral support was removed before the statute of  
20 repose time period and any claim based on the violation of such a  
21 duty is time barred.

22 Additionally, as conceded by plaintiff during oral argument,  
23 plaintiff has no evidence of any apparent post-construction problem  
24 or accident or event which would independently sustain a post-  
25 construction or design negligence claim, or at least create some  
26 duty by defendant to address the problem by acting or refraining  
27 from acting. As such, I find no basis for concluding that Little  
28 supports an exception to the application of the statute of ultimate

1 repose.

2 Finally, plaintiff relies on a 1993 Kansas case which  
3 concerned a trespass claim following the collapse of a subsurface  
4 mine. Nida v. American Rock Crusher Co., 253 Kan. 230, 855 P.2d 81  
5 (1993). The Nida plaintiffs brought a trespass action after a  
6 subsurface mine collapsed, damaging their property. The last  
7 quarrying activity occurred in 1960, but the collapse of the land  
8 did not occur until 1990. The issue before the Kansas Supreme  
9 Court was whether the statute of repose contained in Kansas statute  
10 60-513(b) barred the plaintiffs' action.

11 Subsection (a) of the statute provided a two-year statute of  
12 limitations for trespass claims. Id. at 231, 855 P.2d at 82.  
13 Subsection (b) provided that

14 "[t]he causes of action listed in subsection (a) shall  
15 not be deemed to have accrued until the act giving rise  
16 to the cause of action first causes substantial injury,  
17 or, if the fact of injury is not reasonably ascertainable  
18 until some time after the initial act, then the period of  
19 limitation shall not commence until the fact of injury  
20 becomes reasonably ascertainable to the injured party,  
21 but in no event shall an action be commenced more than 10  
22 years beyond the time of the act giving rise to the cause  
23 of action."

24 Id. at 232, 855 P.2d 81 (quoting K.S.A. 1992 Supp. 60-513(b))  
25 (emphasis added).

26 The defendant mining company argued that the "act giving rise  
27 to the cause of action" was the underground quarrying activity,  
28 which had occurred more than ten years prior to the plaintiffs  
filing suit. The plaintiffs contended that the "act giving rise to  
the cause of action" was the collapse of their surface land, which  
had occurred the same year they filed suit.

The Kansas Supreme Court distinguished negligence claims from

1 intentional torts, focusing primarily upon trespass actions. It  
2 stated:

3 Although a negligence cause of action usually runs  
4 from an act of a defendant, a trespass action need not,  
5 and often would not, run from an act of defendant. There  
6 is no trespass until the entry is accomplished and the  
7 damage occurs (or has begun to occur, as in a case of  
8 continuing trespass). The trespass counterpart of the  
9 negligence "wrongful act" is the entry and the damage.  
10 In the present case, the entry was accomplished and the  
11 damage occurred when the surface fell. . . . Here, the  
12 "act giving rise to the cause of action" was the  
13 subsidence of the surface and not the mining operations.  
14 The mining of the coal was not wrongful and did not give  
15 rise to a cause of action during or upon completion of  
16 the mining of the coal.

17 Id. at 238-39, 855 P.2d at 86-87.

18 Based on Nida, plaintiff argues that her claims against  
19 defendant did not accrue until her property and house began to  
20 move. She notes that the Amended Complaint does not state exactly  
21 when damage to her property began to occur, but it does allege that  
22 she did not discover the subsidence caused by defendant's conduct  
23 until 2004, less than two years before the filing of the case. She  
24 argues that because defendant fails, in this motion, to show that  
25 she filed her action more than ten years after the land subsided,  
26 the case should not be dismissed.

27 I agree with defendant that Nida is distinguishable. First,  
28 as a Kansas case, Nida is not binding on an Oregon claim. Second,  
Nida may be persuasive authority for a trespass claim, but not a  
negligence claim. Id. at 239, 855 P.2d at 87 (noting that  
negligence and product liability cases cited by the defendant were  
distinguishable because they involved the wrongful act of  
negligence or manufacturing and selling a defective or harmful  
product, but in the trespass claim at issue, the act giving rise to

1 the cause of action was the subsidence of the surface and not the  
2 mining operations.). Because plaintiff in the instant case does  
3 not bring a trespass claim, Nida is inapplicable.

4 Third, even if plaintiff were to bring her claim as a trespass  
5 claim, Nida does not supply appropriate reasoning for an Oregon  
6 trespass claim. Under Oregon law, "negligence describes the  
7 defendant's conduct whereas trespass and nuisance describe the  
8 invasion of plaintiff's interest in land. Thus either a trespass  
9 or a nuisance may arise out of intentional, negligent, reckless, or  
10 ultrahazardous conduct." Furrer v. Talent Irrigation Dist., 258  
11 Or. 494, 506 n.5, 466 P.2d 605, 611 n.5 (1970); see also Martin v.  
12 Union Pac. R.R. Co., 256 Or. 563, 565, 474 P.2d 739, 740 (1970)  
13 ("[a] trespass arises when there is an intrusion upon the land of  
14 another which invades the possessor's interest in the exclusive  
15 possession of his land. The intrusion may be caused by either  
16 intentional, negligent, reckless or ultrahazardous conduct.");  
17 Carvahlo v. Wolfe, 207 Or. App. 175, 181-82, 140 P.3d 1161, 1164  
18 (2006) (damage from tree roots did not constitute trespass without  
19 an allegation of fault based on intentional, reckless, or negligent  
20 conduct, or in the absence of an allegation of engagement in  
21 ultrahazardous activity).

22 Kansas does not appear to require an allegation regarding the  
23 nature of the defendant's conduct to sustain a trespass claim.  
24 Here, to support a trespass claim, plaintiff must allege that  
25 defendant's acts of "intrusion" of land were a result of  
26  
27  
28

1 defendant's negligent conduct.<sup>2</sup> As such, the statute of ultimate  
2 repose in O.R.S. 12.115 bars her claim.

3 In Cereghino v. Boeing Co., 826 F. Supp. 1243 (D. Or. 1993),  
4 Judge Jelderks considered both intentional and negligent trespass  
5 claims brought by the plaintiffs against a neighboring landowner  
6 for contamination of the plaintiffs' groundwater by hazardous  
7 chemicals. After granting summary judgment to the defendant on the  
8 intentional trespass claim, Judge Jelderks considered the  
9 defendant's argument that the statute of ultimate repose in O.R.S.  
10 12.115 barred the negligent trespass claim because it was  
11 undisputed that more than ten years elapsed between the use of the  
12 chemical on the defendant's property and the filing of the action.

13 Judge Jelderks first explained that he "initially questioned  
14 the proposition that the statute of ultimate repose could bar  
15 plaintiffs' negligent trespass and nuisance claims, because it  
16 appeared to be inconsistent with a neighboring landowner's ongoing  
17 responsibilities, such as that of providing lateral and subjacent  
18 support to contiguous property." Id. at 1247. However, despite  
19 "continu[ing] to find the application of the statute of ultimate  
20 repose to the facts of this action somewhat inconsistent with the  
21 general obligations of a neighboring landowner[,]" Judge Jelderks  
22 concluded, "after devoting considerable attention and research to  
23 this issue," that the statute barred the negligent trespass and  
24 nuisance claims. Id.

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26 <sup>2</sup> While in theory a trespass claim can be supported by an  
27 allegation that the defendant acted intentionally or recklessly,  
28 or engaged in ultrahazardous activity, the Amended Complaint  
supports only an allegation of negligent conduct.



1 Judge Jelderks based his conclusion "primarily upon the Oregon  
2 Supreme Court's explication of the effect of the statute of  
3 ultimate repose in Josephs[" Id. He noted that the Josephs  
4 court explained that the words "'act or omission complained of' did  
5 not relate to the collapse of the roof" because "'it seems obvious  
6 . . . that such language refers to the acts of commission or to  
7 omissions which are the basis for plaintiffs' claims of defendant's  
8 negligence and that the language does not refer to the occurrence  
9 of the resulting damage.'" Id. at 1248 (quoting Josephs, 260 Or.  
10 at 496, 491 P.2d at 204) (ellipsis in Cereghino).

11 Judge Jelderks explained that

12 Under Josephs, it is clear that the "act or  
13 omission" referred to in the statute of ultimate repose  
14 is an act or omission of a person, not the act of objects  
15 such as hazardous substances. This case also clarifies  
16 that the statute begins to run at the time of an initial  
17 negligent act or omission, and does not refer to any  
18 ongoing duty to correct the initial wrong. In the  
19 present action, plaintiffs' contentions that the "acts"  
20 complained of are the invasion of contaminants, and the  
21 omission was the failure to prevent the migration after  
22 disposal, therefore fail. The Oregon Supreme Court left  
23 no doubt in Josephs that potential plaintiffs such as the  
24 Cereghinos can be barred from recovery even before they  
25 have been harmed.

26 Id.

27 In the instant case, even if plaintiff were to further amend  
28 her Amended Complaint to bring a trespass claim instead of a  
negligence claim, the reasoning of Josephs and Cereghinos shows  
that the claim would still be barred by O.R.S. 12.115 and thus, any  
such amendment would be futile. Accordingly, defendant's motion is  
granted.

/ / /

/ / /

CONCLUSION

Defendant's motion to dismiss (#4) is granted.

IT IS SO ORDERED.

Dated this 18th day of October, 2006.

/s/ Dennis James Hubel  
Dennis James Hubel  
United States Magistrate Judge